BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUSSELL DERRY Claimant	)	
VS.	)	Docket No. 1,024,528
WINSTEADS & WAIDS COMPANY Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 21, 2007, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on July 10, 2007. David Ben Mandelbaum, of Leawood, Kansas, appeared for claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that notwithstanding claimant's testimony that he was deliberately assaulted by a coworker, claimant was, in fact, involved in an accident arising out of and in the course of his employment when he and a coworker bumped into each other. However, the ALJ found that claimant did not suffer an injury from the accidental contact. Accordingly, the ALJ found claimant was not entitled to workers compensation benefits.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues the uncontroverted evidence establishes that he suffered an injury by accident arising out of his employment with respondent. Claimant states he was treated at an emergency room the day after the incident, where he was administered a painkiller. He was also examined by Dr. Douglas Rope, who found he had a 10 percent permanent partial impairment to the body as a whole as a result of his work-related injury, and by Dr. Michael Poppa, who found he had a 5 percent permanent partial impairment to the body as a whole as a result of his work-related injury. Claimant requests the Board award

him compensation in the amount of 10 percent whole body permanent partial disability, as well as his medical bills.

Respondent asserts that claimant's testimony was that he was deliberately struck by a coworker, Emilio Cervantes. Claimant specifically stated that it was not horseplay. Respondent also notes that Mr. Cervantes and two of claimant's coworkers testified that there was only a minimal touching of the shoulders between claimant and Mr. Cervantes that could not have caused an injury. Respondent argues that under either scenario, the ALJ correctly denied claimant's claim for workers compensation benefits.

The issues for the Board's review are:

(1) Did the claimant suffer an injury by accident arising out of and in the course of his employment?

(2) If claimant suffered an injury by accident arising out of and in the course of his employment, what was his degree of disability?

(3) If claimant suffered an injury by accident arising out of and in the course of his employment, is he entitled to the costs of his medical treatment?

FINDINGS OF FACT

Claimant worked full time at respondent as a grill cook, earning $8 per hour. On July 30, 2005, he needed to take a restroom break. In order to do so, he needed to pass by three coworkers. Claimant asserted that as he passed Emilio Cervantes, Mr. Cervantes lowered his shoulder and lunged into claimant in the manner of a football player moving into a blocking sled. When claimant was hit by Mr. Cervantes, he hit a bun grill counter that weighed between 400 and 500 pounds with enough force that the counter moved about a foot out of position. Claimant did not fall to the floor. He felt pain at the moment of impact, but the pain was not severe enough to cause him to go home, and he continued working and finished his shift. Claimant denied any previous altercations or confrontations. None of the three coworkers had ever teased him or made an aggressive move toward him before. Claimant said it was not horseplay. Claimant agreed that normally people did not accidently lower their shoulder and run into other people. Claimant immediately reported the incident to the general manager, Jamal Freijat.

The next morning, claimant attempted to get out of bed but the pain in his groin from straining to hold up his body during the impact was so severe it took him almost 10 minutes. Later that morning, he sought medical treatment from the emergency room at the Overland Park Regional Medical Center. Dr. Terry Lienhop administered a painkiller in claimant's hip, and about 30 minutes later, that area began to feel numb. Dr. Lienhop examined claimant's back and found swelling in the tissues and bruised muscles at the midpoint of the back on the left side.

Claimant returned to work on August 2 and was met by Wanda Lamaster, respondent's area supervisor. Claimant showed her a copy of his medical slip allowing him to return to work. Ms. Lamaster had him fill out a workers compensation claim form, but he was not offered any medical treatment. Claimant terminated his employment with respondent on August 2, 2005, because he felt he was being placed in danger and respondent would no longer protect him.

On August 11, 2005, claimant went to see Dr. Richard Randolph. Dr. Randolph recommended gentle stretching and hot baths to loosen the tightened muscles. Claimant has followed these recommendations and has gotten some slight relief. Currently, claimant feels a twinging pain in his back midpoint on the left side. This is where he claims he was hit by Mr. Cervantes' shoulder. He has trouble reaching, bending, lifting, and walking.

Mr. Cervantes works for respondent as a grill cook and dishwasher. He denied lowering his shoulder and running into the back of claimant. He said that he and claimant just grazed each other at the shoulders. There was not enough force for anyone to be hurt. They just passed each other as claimant was going to the restroom and Mr. Cervantes was going to get some potatoes, and they bumped into each other. There had been no previous confrontations between Mr. Cervantes and claimant. Mr. Cervantes did not see claimant fall or strike against anything in the kitchen.

Armando Vividor and Jose Gullen work for respondent in the kitchen. They witnessed the incident between Mr. Cervantes and claimant and said they just bumped into each other. Both said claimant's and Mr. Cervantes' shoulders touched. Claimant did not fall into the bun grill counter. Mr. Vividor testified that claimant did not seem to be hurt.

Dr. Douglas Rope, who is board certified in internal medicine, examined claimant on May 9, 2006, at the request of claimant's attorney. Claimant gave him a history of having been intentionally struck by a coworker. The coworker's shoulder struck his rib cage and pushed him into a grill counter. Claimant strained himself to keep from falling. Claimant said he had pain in the area of his rib cage and in the left groin area of his leg. He went to the emergency room the next morning, where he was diagnosed with a contusion of the left ribs.

Claimant complained of difficulty flexing forward at the waist because of pain. He also had difficulty carrying anything or lifting more than five or ten pounds. Upon examining claimant, Dr. Rope found he had deep tenderness in the lumbar paraspinal musculature in the lower ribs posteriorly on the left side. He had a positive seated knee extension on the left, which would be indicative of some pathology at the L4-L5, L5-S1 level. He had good flexion and was able to bring his fingertips to within three inches of the floor. However, his erect sacral angle was reduced, which is a result of lumbar muscle spasm. His lateral flexion was normal. He had positive straight leg raising, which is an objective neurologic sign. Dr. Rope diagnosed claimant with left sided thoracic rib and paraspinal strain.

Based on the AMA *Guides*,[1] Dr. Rope rated claimant as having a 10 percent permanent partial impairment for thoracic impairment due to the July 30, 2005, trauma. Dr. Rope used the diagnosis related estimate (DRE) method but could not remember whether he used the section for cervical thoracic or for thoracolumbar. Dr. Rope testified that claimant would not be in Category III because he does not have radiculopathy. Dr. Rope would place claimant somewhere between Category II and Category III because he showed some signs of nerve root irritation without clearly meeting the criteria of Category III. Dr. Rope agreed that Category II talks about nonverifiable radicular complaints, no objective signs of neurologic impairment, and no loss of structural integrity; and those all applied to claimant. Dr. Rope said claimant's condition did not rise to the level of a 15 percent radiculopathy, so a 10 percent permanent partial impairment seemed appropriate.

Dr. Michael Poppa, a board certified independent medical examiner who is also board certified in occupational medicine, examined claimant on July 18, 2006, at the request of respondent. Claimant complained to him of twinges like sharp pains in his back. Dr. Poppa found that claimant had a decreased range of motion in all planes of his back. Claimant had no evidence of neurological deficits. He had normal reflexes. Manual muscle testing revealed no strength deficits. Pin prick testing revealed no radicular finds involving his upper extremities. Seated straight leg raising was normal. Dr. Poppa diagnosed claimant with thoracolumbar contusion and strain caused by his work at respondent. He found no radiculopathy. Using the AMA *Guides,* DRE Category II for the thoracolumbar spine, Dr. Poppa rated claimant as having a 5 percent permanent partial impairment of the whole person.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[2] K.S.A. 2005 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

Fights between coworkers usually do not arise out of employment and generally will not be compensable.[5] If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.[6] For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,[7] or the employer had reason to anticipate that injury would result if the coworkers continued to work together.[8]

ANALYSIS

If the contact between claimant and Mr. Cervantes was an assault, then it is not compensable under these facts. However, if it was an accident, it was probably not of sufficient force to have caused injury. All of the three witnesses to the July 30, 2005, incident, including Mr. Cervantes, said the contact between claimant and Mr. Cervantes had been accidental. Only claimant believed it was deliberate. The Board disagrees with the finding by the ALJ that the contact was minor and accidental and that claimant has established that there was an accident that arose out of and in the course of his employment with respondent on the date alleged. The question is whether the contact was sufficient to have caused an injury to claimant. If it was sufficient to cause the injuries, then it was most likely deliberate. Mr. Cervantes and the other two witnesses describe the contact as minimal, a mere brushing of shoulders as claimant and Mr. Cervantes passed by each other. Claimant describes a much greater degree of force. In support of claimant's version of the event is the fact that claimant sought medical treatment the next day and a description in the emergency room records from that following day of swelling and bruising in claimant's left rib cage area. In addition, two physicians describe claimant

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[4] *Id.* at 278.

[5] *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

[6] See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[7] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

[8] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

as having some permanent impairment of function as a result of the accident. On the other hand, those physicians relied upon claimant's version of the event to arrive at their causation opinions. Furthermore, claimant admits that he was not in much, if any, pain on the date of accident and he was able to complete his work shift that day.

Claimant was certain enough that he had been assaulted that he quit his job of six years out of fear for his personal safety. The Board finds claimant was injured and that his injuries resulted from an unprovoked and unforeseeable assault from a coworker. Even though the medical records contain a contrary history, claimant testified that there was no history of ill will between himself and Mr. Cervantes, so there was no reason for the employer to anticipate that an assault and injury would result if the two continued to work together. The assault did not result from an argument about work. There was no hazard associated with the workplace that exacerbated the injury. Unlike the pit that the claimant was pushed into in *Baggett*, under the facts of this case, the bun grill counter that claimant was pushed into did not constitute an employment hazard that exacerbated the injury. Claimant's testimony is that his back hurts where he was struck by Mr. Cervantes, not where he struck the counter.

The possibility exists that Mr. Cervantes did not intend to injure claimant and that his actions were merely horseplay. If so, claimant was the innocent victim of the horseplay, and his injuries would be compensable.[9] However, Mr. Cervantes did not say that his actions were intentional but playful, and claimant certainly did not take it that way.[10] Claimant clearly believed that he had been assaulted and quit his job out of fear because of it. Based on this record, the Board cannot find that Mr. Cervantes was engaging in horseplay when he shoved or pushed claimant.

CONCLUSION

Claimant's injury resulted from an assault by a coworker under circumstances that do not remove it from the general rule that such assaults are not compensable. Accordingly, claimant's injury did not arise out of his employment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 21, 2007, is reversed as to the finding that claimant proved an accident that arose out of his employment, but the finding that claimant is not entitled to workers compensation benefits is affirmed.

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[9] See *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 130 P.3d 111 (2006).

[10] R.H. Trans. at 11.

IT IS SO ORDERED.

Dated this _____ day of July, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David Ben Mandelbaum, Attorney for Claimant
Mark E. Kolich, Attorney for Self-insured Respondent
Kenneth J. Hursh, Administrative Law Judge